BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the District Court has not yet been officially reported but a copy is to be found in the Record (R. 78a).

The opinion of the Circuit Court of Appeals for the Third Circuit, filed on July 22, 1943, has not yet been officially reported, but a copy appears in the Record (R. 215a).

II.

STATEMENT OF THE CASE.

Petitioner seeks to review the judgment of the Circuit Court of Appeals for the Third Circuit, filed July 22, 1943, affirming the judgment and sentence entered in the United States District Court for the Middle District of Pennsylvania on May 26, 1943 after a hearing before the Honorable Albert L. Watson, D. J.

The facts have been set forth in the foregoing petition (pp. 1-4) and will not be repeated.

III.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals for the Third Circuit erred:

1. In holding that the District Court did not err in adjudging petitioner guilty of contempt on charges not specifically set forth in the presentment.

2. In holding that the record discloses substantial evidence to sustain the findings of the District Court that the petitioner was guilty of contumacious conduct.

3. In concluding that the petitioner was guilty of contumacious conduct without specifying wherein he was so guilty and without showing wherein said conduct obstructed the investigation.

4. In affirming the judgment of the District Court.

IV.

ARGUMENT.

(1)

The Circuit Court Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings, or So Far Sanctioned Such a Departure by a Lower Court, as to Call for an Exercise of This Court's Power of Supervision.

The presentment charged the petitioner with two specific acts of contumacy. As to one of these specific charges (i. e. perjury) the District Court found that the testimony offered by the Government at the contempt hearing did not prove said charge beyond a reasonable doubt (R. 79a).

The other specific charge related to the disposition of $38,125.48 which the petitioner withdrew from his bank by eight separate checks between May 16, 1942 and November 25, 1942 (R. 5a). The presentment charged that the petitioner "will not disclose to the grand jury what he did with these specific withdrawals, and further that he doesn't remember whether he went to the races with the money, whether he won or lost at each race or whether he put the money in his lock box" (R. 5a).

The examination of the petitioner before the grand jury was concerned principally with the disposition of this money. The evident purpose of such examination was to test the credibility of the petitioner's testimony that he had not paid any of the profits he received from selling slag to the Government's contractor to anyone connected with said contractor. The petitioner had testified that he had not paid any money to anyone connected with the contractor (R. 9a, 11a, 17a, 18a, 22a).

The petitioner fully and to the best of his recollection gave an accounting of the disposition he made of this money. And in doing so he supplied the Grand Jury with supporting data—such as the name of the person to whom he repaid a loan from this money, the name of the bank where he kept his personal account and his safe deposit box where he testified he had deposited some of the money and exhibiting United States War and Tax Bonds, which he testified he purchased with some of said money. He likewise testified to losing certain money on horse races, giving the names of the race tracks which he visited, the amounts which he lost and the names of the men who accompanied him.

The Government has never shown that this accounting was false in any respect or that it was inherently improbable or necessarily unreasonable. Cf. *Blim v. United States*, 68 F. (2d) 484. And neither the District Court nor the Circuit Court has pointed out wherein the petitioner's accounting was of this character. The District Court contented itself with the conclusion that the petitioner "had no clear recollection of what he did with this money" (R. 82a). Such conclusion completely ignored the accounting which the petitioner gave. The Circuit Court did not even comment upon the petitioner's testimony concerning his disposition of this money. It did not designate any specific act of contumacy but based its affirmance of the District Court's judgment upon the general charge of contumacy, with which the presentment concluded (R. 217a).

This general charge does not specify with any show of particularity wherein the petitioner contumaciously obstructed the process of the Court.

The judgment of contempt rendered against the petitioner upon this general charge was unquestionably a departure from the accepted and usual course of judicial proceedings.

A contempt proceeding of this nature is summary in character, and carries the criminal hallmark. Recognizing these facts, the courts have clothed a defendant in a contempt proceeding with the protective attributes generally associated with a defendant in a criminal proceeding. He is presumed to be innocent until that presumption is overcome and his guilt established beyond a reasonable doubt: *Blim v. United States,* supra; *United States v. Dachis,* 36 F. (2d) 601. And while there is no fixed formula for contempt proceedings and the nicety and precision of an indictment is not required, a person cited for contempt must be informed of the charges made against him so clearly and definitely as not only to show a prima facie case, but that when arraigned he might know what answers to make and how to prepare his defense: *Sona et al. v. Aluminum Castings Co.,* 214 F. 936. A person cannot be convicted for contempt upon general charges vaguely and indefinitely stated: *United States v. French,* 9 F. Supp. 30.

The Circuit Court was of the opinion that because the petitioner knew from the presentment that the charge of contumacy was based upon the whole of his testimony before the Grand Jury, the above rule was not applicable. If this were the law an oppressive burden would be cast upon a defendant, particularly where his testimony is voluminous. Especially is this true in a case where, as the record herein shows, the presentment was filed on May 7, 1943, returnable the following day and where the testimony consisted of 283 pages.

As stated by the District Court in an opinion affirmed

by the Circuit Court of Appeals for the Second Circuit in the case of *In re Cantor et al.*, 215 F. 61, at page 63:

> "There is one thing more: Every judicial proceeding and every charge to which another must respond justly requires that the respondent should know with reasonable definition what he has to answer. It will not do, as in this case, to throw at a man 120 pages of testimony and say generally that it is generally permeated with perjury. Some specification the most elementary rules of fair play demand, so that he may explain what he is charged with * * *".

Thus it will be observed that the authorities condemn the rendition of contempt judgments when based upon vague and general charges. This principle is grounded on the accepted and elementary rules of judicial procedure. The degree of particularity required may vary in relation to the nature of the judicial proceeding to which a person must respond. A contempt proceeding of a criminal nature takes on all the attributes of a criminal case. It is even more far-reaching and drastic because it is more arbitrary in character and therefore should always be exercised cautiously and with due regard to constitutional rights: *United States v. Moore*, 294 F. 852.

The specific issue with which the petitioner was confronted by the presentment in the instant proceeding related to his testimony concerning his disposition of certain designated moneys. The petitioner met this issue by accounting in his testimony for these moneys. The District Court ignored his accounting as likewise did the Circuit Court of Appeals. The latter Court in affirming the judgment against the petitioner did so on the basis of the general charge of contumacy laid in the presentment with reference to the specific charge therein. This general charge while accusing the petitioner with wilfully, deliberately and contumaciously obstructing the process of the

Court does not designate any particular answer or answers which bear this stigma. And the Circuit Court in its opinion has not done so.

In this connection, the Circuit Court said (R. 217a):

> "The appellant's principal contention is that the District Court erred in adjudging him guilty of contempt on charges not specifically set forth in the presentment. In other words, the appellant contends that, before the District Court could find, even as the predicate of a charge of contumacy, that, while a witness before the grand jury, he had given perjurious testimony, he must be informed of the charges made against him so clearly and definitely as not only to show a *prima facie* case but also to enable him to know, when arraigned, what answers to make and how to prepare his defense. *Assuming that this contention correctly reflects the law, it is not germane here.** The defendant knew from the presentment that the charge of contumacy was based upon the *whole of his testimony** before the grand jury which he had just given and a transcript whereof was appended to the presentment. He was sufficiently informed as to what he had to meet. Cf. Camarota v. United States, *loc. cit. supra.*"

We submit that petitioner *has* correctly stated the law and that it is *germane* here. A *prima facie* case is not made out when the general charge contains no reference to any specific answers and it is necessary for petitioner to analyze voluminous testimony to ascertain wherein his answers are supposed to be contemptuous.

We submit that this places an unreasonable burden upon any defendant in a contempt case who, though presumed to be innocent (*In re Eskay*, 122 F. (2d) 819) is

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*Italics supplied.

thus forced to guess at those answers which the grand jury considered contumacious.

It seems clear that the failure to indicate more specifically the answers which it was intended to charge as being contumacious deprives the petitioner of the notice to which he is entitled in order properly to prepare his defense.

The case of *Camarota v. United States*, 111 F. (2d) 243, cited and relied upon by the Circuit Court in this connection (R. 217a) supports petitioner's present position. There defendant refused to answer *certain* questions on the ground that they might incriminate him. He was called before the trial Judge and instructed to answer *those* questions, which he refused to do. He was adjudged guilty of contempt, and this judgment was affirmed by the Circuit Court which said (p. 246):

> "It is true that where, as here, the contempt was not committed in the actual presence and hearing of the district judge due process 'requires that the *accused should be advised of the charges and have a reasonable opportunity to meet them* by way of defense or explanation' . . . The record . . . discloses that appellant . . . had opportunity . . . to consult with counsel as to the propriety of his stand upon *each specific question* which he had refused to answer . . . that . . . he was told personally to appear before the district judge and answer the charge *arising out of his refusal to answer the questions propounded*. . . ." (Italics supplied).

Petitioner was not afforded this opportunity in the case at bar. He sufficiently answered the *specific* charge in the presentment. The record shows that he did in fact answer the questions propounded. As to the generalities, he was given no opportunity to answer—indeed, he had no way of knowing what had to be answered.

(2)

The Circuit Court Has Decided an Important Question of Federal Law Which Has not Been, but Should Be, Settled by This Court.

The conviction of the petitioner under these circumstances has serious implications, Obviously it is a departure from the accepted and usual course of judicial proceedings particularly when it is considered that this proceeding is of a criminal nature.

To the best of our knowledge this precise question has not been decided by this Court. However, this Court has recognized the necessity of definite issues in contempt proceedings and has disapproved of enforcing vague and general statements in contempt orders if not limited by specification of details: *Terminal Railroad Association of St. Louis et al. v. United States, et al.*, 266 U. S. 17, 29.

Moreover, this Court has held that an obstruction to the performance of judicial duty is the characteristic upon which the power to punish for contempt must rest and that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted: *Ex Parte Hudgings*, 249 U. S. 378, 383. This requirement would be circumvented if a defendant could be convicted of contempt upon general charges only without any specification of details.

CONCLUSION.

It is respectfully submitted that for the reasons stated, this Petition for a writ of Certiorari should be granted.

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